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Office of the Attorney General

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Honorable Richard Helms
Director of Central Intelligence
Washington, D.C. 20505

Dear Mr. Helms:

The Attorney General's memorandum to the heads of executive departments and agencies on wiretapping and electronic surveillance dated June 16, 1967, has been revised to bring up to date the discussion of the law applicable to consensual monitoring and to simplify the reporting procedures.

A copy of the revised memorandum is attached hereto.

Sincerely,

Attorney General

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Washington, D. C.

OCT 16 1972

MEMORANDUM TO THE HEADS OF EXECUTIVE
DEPARTMENTS AND AGENCIES

Re: Monitoring Private Conversations with
the Consent of a Party

This memorandum concerns the investigative use of electronic and mechanical devices secretly to overhear, transmit, or record private conversations when one or more of the parties to the conversation is a Federal agent or is cooperating with a Federal agent and has consented to the overhearing, transmitting, or recording of the conversation. This memorandum does not restrict any form of monitoring when all parties to the conversation consent, nor does it affect existing instructions on the related matter of electronic surveillance without the consent of any party to a conversation.

(See Manual for Conduct of Electronic Surveillance under Title III of Public Law 90-351; and Outline of Duties and Responsibilities of Attorneys and Agency Personnel Involved in the Conduct of Title III Court Authorized Interceptions, distributed Nov. 3, 1970).

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with the Consent of a Party.

The Supreme Court of the United States has for some time distinguished between electronic surveillance of a conversation without the consent of any of the participants, which in most circumstances is constitutionally impermissible without court order, and the monitoring of a conversation with the consent of one but not all of the participants. See On Lee v. United States, 343 U.S. 747 (1952) (informant carrying concealed transmitter); Lopez v. United States, 373 U.S. 427 (1963) (agent carrying concealed recorder); Rathbun v. United States, 355 U.S. 107 (1957) (police officer listening on extension telephone). While the decisions in the cases involving consensual monitoring have been predicated on various grounds, it is apparent that the central difference between consensual monitoring and non-consensual electronic surveillance is that in the consensual situations there exists one party to the conversation who is working with the government and who will relate to the government the substance of the conversation, and that in such situations the monitoring serves simply to provide instantaneous communication and to assure effective corroboration. The government in such situations gains access to no information it would not otherwise have obtained; it simply obtains it faster and in a more probative

form. This essential difference was recently emphasized by the Supreme Court United States v. White, 401 U.S.C 745 (1971) decided April 5, 1971, in which the Court held that a Federal agent could properly testify to statements he had overheard a defendant make to a government informer by means of a secret transmitting device which the informer had concealed on his person at the time. Announcing the judgment of the Court, Mr. Justice White stated:

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights.

* * * For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, * * * (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. * * * If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

* * * [T]he law permits the frustration of actual expectations of privacy by permitting authorities to use testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants * * *. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. [Citations omitted]

The Court in White, after noting that there was no constitutional prohibition against the monitoring of conversations with the consent of one party, called attention to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. That statute, in the subsection enacted as 2511(2) of Title 18 of the United States Code, excepted consensual monitoring from its coverage as follows:

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire [i.e., telephone] or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception

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unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purposes of committing any other injurious act.

II. Administrative Regulations Concerning Consensual Monitoring Conversations.

The monitoring of conversations with the consent of one of the participants is a particularly effective and reliable investigative technique, and its use by Federal agents in investigating criminal cases is encouraged where appropriate and is expected where necessary. Nevertheless, although it is clear that such monitoring is constitutionally and statutorily permissible -- and therefore that it may be conducted without judicial warrant -- it is appropriate that this investigative technique continue to be the subject of careful self-regulation by the Executive Branch of the Federal Government. Accordingly, the following restrictions will apply in all criminal investigations employing the consensual monitoring of conversations.

(a) Conversations other than telephone conversations.

All Federal departments and agencies shall, except in exigent circumstances as discussed below, obtain the advance authorization of the Attorney General or any designated Assistant Attorney General before using any mechanical or

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electronic device to overhear, transmit, or receive private

conversations other than telephone conversations without the consent of all the participants. Such authorization is required before employing any such device, whether it is carried by the cooperating participant or whether it is installed on premises under the control of the participant.

Requests for authorization to monitor private conversations shall be addressed to the Attorney General, in writing, by the head of the department or agency responsible for the investigation, or his delegate, and shall state:

1. The reason why monitoring appears desirable, the means by which it would be conducted, the place in which it would be conducted, and its expected duration.
2. The names of the persons whose conversations would be monitored and their roles in the matter under investigation. When the name of the non-consenting party or parties is not known at the time the request for authorization is made, the department or agency making the request shall supply such information to the Attorney General within 30 days after the termination of the monitoring.

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person making the request that monitoring is warranted in the interest of effective law enforcement.

Requests for authorization will receive prompt consideration by the Attorney General or his designee. To assure adequate time for considering a request and for notifying the requesting department or agency of the appropriate decision, it is important that each request be received by the Office of the Attorney General no less than 48 hours prior to the time of the intended monitoring. It should be clearly understood that the use of consensual devices will not be authorized retrospectively.

Where a request cannot be made in compliance with the 48-hour requirement, or in exigent circumstances precluding request for authorization in advance of the monitoring -- such as the imminent loss of essential evidence or a threat to the immediate safety of an agent or informant -- emergency monitoring may be instituted under the authorization of the head of the responsible department or agency or other agency official or officials designated by him. The Attorney General or his designee shall be notified promptly of any such monitoring

and of the specific conditions that preclude obtaining advance
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approval, and shall be afforded the information enumerated

above that would have been given in requesting advance approval. Each department and agency should develop procedures to assure that under such exigent circumstances its agents will be capable of acting expeditiously. The Attorney General or his designee shall be kept advised as to the identity of those officials who have been designated by department or agency heads to authorize such emergency monitoring.

(b) Telephone conversations.

II
Telephone conversations -- because they involve the transmission of the participants' conversations through a complex and far-flung network of wires, the common use of multi-party lines and extension telephones, and the possibility of an unseen participant permitting another person to listen at the same telephone -- have long been considered not to justify the same assumption of privacy as a face-to-face conversation. Nevertheless, there is still a need to provide for the supervision and control of consensual monitoring of telephone conversations. Accordingly, the current practice of charging each department and agency with the control of such consensual monitoring by its agents will continue. Each department and agency head shall assure the adoption or the

also provide for the expeditious, oral authorization of such monitoring where necessitated by exigent circumstances.

III. Security of monitoring devices.

It shall be the responsibility of the head of each investigating agency to procure and maintain only the minimum number of devices designed for the consensual monitoring of conversations that the agency reasonably needs, consistent with current policy, to overhear, transmit, or record private conversations for investigative purposes. The equipment shall be stored, as feasible, in one central location or in a limited number of locations so as to facilitate administrative control.

An inventory shall be maintained on a current basis at each location at which monitoring equipment is stored. All equipment must be accounted for at all times. When equipment is withdrawn from storage a record shall be made as to the times of withdrawal and of its return to storage. By written report, the agent to whom the equipment is assigned shall account fully for the time he possessed the monitoring equipment and the uses he made of it. Equipment should be returned to storage when not in actual use except to the extent that returning the equipment would interfere with its proper utilization.

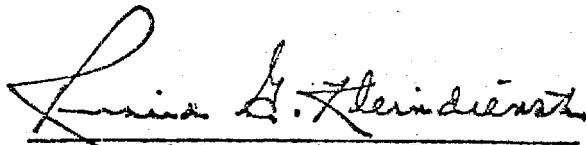
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Each agency shall maintain copies of the complete

inventories of equipment showing the times of withdrawals and returns, and copies of the written reports of the responsible agents specifying the uses made of the equipment. Such records should be retained for at least six years.

IV. Annual Reports.

The head of each investigative agency, or his delegate, shall submit to the Attorney General during July of each year a report containing (1) an inventory of all the agency's electronic and mechanical equipment designed for the monitoring of conversations, and (2) a brief statement of the results obtained during the prior fiscal year by the use of such investigative monitoring.

This Memorandum supersedes the Memorandum to the Heads of Executive Departments and Agencies, dated June 16, 1967, captioned "Wiretapping and Electronic Eavesdropping."


Attorney General